APPENDIX A

TRAN QUI THAN,

Plaintiff-Appellant,

v.

Donald T. Regan*

Defendant-Appellee.

No. 79-4299.

United States Court of Appeals,

Ninth Circuit

Argued and Submitted

Feb. 10, 1981.

Decided Oct. 13, 1981.

*We substitute the name Donald T. Regan, the successor to the original defendant W. Michael Blumenthal, as the Secretary of the Treasury, pursuant to Fed.R.App.P. 43.

ALARCON, Circuit Judge:

Appellant Tran Qui Than (Than) appeals from a grant of summary judgment in favor of the Secretary of the Treasury (Secretary). The judgment upheld the Secretary's decision to deny Than's application for a license to unblock certain funds in the United States which had been blocked pursuant to §5(b) of the Trading with the Enemy Act (hereinafter "TWEA"), 50 U.S.C.App. §5(b), and the Foreign Assets Control Regulations (Regulations), 31 C.F.R. §§500.101 et seq. (1980). This court has jurisdiction pursuant to 28 U.S.C. §1291. We affirm in part and remand in part.

I. FACTS

The facts are not in dispute. Than is a citizen of the Republic of Vietnam and a resident alien of the United States. Prior to fleeing from Vietnam on April 25,

1975, Than was a shareholder, director, and president[1] of the Dong Phuong Bank, a private corporation established in 1968 under the laws of the Republic of Vietnam.

As of April 30, 1975, the date on which South Vietnam fell to the communist forces, the Bank was owned by twenty shareholders, all of whom were nationals and residents of Vietnam. The Bank's ten directors owned more than 80 percent of the outstanding shares; Than was the principle shareholder, owning a fraction less than 13 percent of the shares outstanding.

The shareholder-directors met on April 15, 1975, to consider the consequences to the Bank which might follow the defeat of the South Vietnamese forces. At this meeting they unanimously adopted a resolution which provided that effective upon the day

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[1] There are conflicting statements in the record with respect to whether Than was president or general director of the Bank.

of the occupation of Saigon by the enemy forces, those members of the management board "who will be able to leave the country will be qualified to manage and to make use of all ... properties that the [Bank] possesses abroad." The resolution further provided that those board members who remained in Vietnam after the communist takeover would be empowered to "manage and to make use of the properties of the Dong Phuong Bank located in [Vietnam].[2]

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[2] The Vietnamese text and an English translation of the Resolution was provided to the Secretary in Than's license application. It provides in part:

> Management of the assets in foreign countries of the Dong Phuong Bank.
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> * * * * * *
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> 1. Considered is the present state of urgency and the belief that the metropolis of Saigon may be taken over by the Communist government in the near future thus making impossible all banking operation with other banks in America, in Europe, and in Japan.

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On May 1, 1975, The Provisional Revolutionary Government of Vietnam ("P.R.G.") issued a communique which directed that banks would be confiscated and thereafter "managed by the revolutionary administration."[3] On this date the Bank was the assignee of monies owed to certain local

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> 2. Accordingly, the Managment Board decides that those among the Management Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phuong Bank in banks located out of Vietnam as well as the properties that the Dong Phuong Bank possesses abroad.
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> 3. At the same time, the Management Board empowers those among the Management Board members who will remain in Vietnam to manage and to make use of the properties of the Dong Phuong Bank located in the country.
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> The present decision will be enforced beginning the day when the Saigon metropolis will be occupied by the Communist government.

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[3] The parties dispute the date on which the Bank was actually confiscated. Than maintains that confiscation occurred on April 30, 1975, upon the

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Vietnamese contractors under several contracts with the United States Army and Navy.[4]

After arriving in the United States, Than, on behalf of the Bank, sought payment from the United States Army on the executory contracts in the amount of $221,235. The Army did not dispute the validity or the amount of the claim. It refused to make the payment, however, on the ground that the funds were blocked pursuant to §5(b) of the Trading with the Enemy Act,[5] and the For-

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arrival of the communist forces into the Saigon City limits. The government maintains that the Bank continued to function until August, 1975. It is undisputed, however, that the Bank, in whatever form it presently exists, is now controlled by the P.R.G.

[4] The executory contracts had been fully performed by the Vietnamese contractors by April 30, 1975, but a residual sum was still owed on those contracts by the Army and Navy.

[5] Section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C.App. §5(b),
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eign Assets Control Regulations,[6] which had

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provides in pertinent part:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise-
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> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.
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> * * * * * *

Section 5(b) was amended in 1977 to restrict the President's authority only to times of war. Act of Dec. 28, 1977, Pub.L. No. 95-223, §101(a), 91 Stat. 1625. This restriction was made prospective, however, Id at §101(b). The President's authority under §5(b) was delegated to the Secretary of the Treasury. 7 Fed.Reg. 1409 (1942). The Secretary redelegated that authority to the Director, Office of Foreign Assets Control. 32 Fed.Reg. 3472 (1967).

6 Section 500.201 of the Foreign Assets Control Regulations, 31 C.F.R. §500.201 (1980), provides

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been promulgated pursuant to TWEA. The

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in pertinent part:

> (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect: (1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;
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> (2) All transactions in foreign exchange by any person within the United States; and
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> (b) All of the following transactions are prohibited, except as specifically authorized by the Sec-

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Army notified Than that he would have to

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retary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, ruling, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect: (1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States;

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(d) The term "designated foreign country" means a foreign country in the following schedule and the terms "effective date" and "effective date of this section" mean with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area:

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3. North Viet-Nam, i.e., Viet-Nam north of the 17th parallel of north latitude: May 5, 1964.

4. South Vietnam, i.e., Vietn-Nam south of the 17th parallel of north latitude: April 30, 1975 at 12:00 p.m. e.d.t.

* * * * * *

obtain a license from the Secretary of the Treasury to unblock those funds in order to receive the contract payment.

In an attempt to acquire the Navy contract payments, Than signed a release to the original Vietnamese contractor of the Bank's claim as assignee of those payments. The Navy paid $49,965 to that contractor. The contractor paid $29,975.44 to Than, which represented the Bank's share of the proceeds. Than in turn remitted that amount to the other shareholders of the Bank who had fled Vietnam, except for his share, which amounted to $5798. The Navy made no mention of a need either for the contractor or Than to obtain any license from the Secretary in order to receive that payment.

On December 22, 1976, Than applied to the Treasury Department's Office of Foreign Assets Control for a license to unblock the Army funds. The application was denied on February 22, 1977. The Secretary deter-

mined that the April 15, 1975, Resolution was ineffective to dissolve the corporation or transfer its assets to the shareholders. He concluded, therefore, that (1) the corporation was a "designated national" within the meaning of §500.302 of the Regulations because it had an interest in the blocked assets after 12:00 p.m. E.D.T. on April 30, 1975, the date on which Vietnam was added to the schedule of designated foreign countries; and (2) as a "designated national," all transactions involving assets in the United States in which it had an interest were blocked. The Secretary also advised Than that the Navy funds which had already been paid would have to be traced and placed into blocked accounts.

Section 500.305 of the Regulations defines a "designated national" to include individuals and corporations who are "nationals" of a designated foreign country. Under §500.302 the term "national" includes

a citizen of a designated foreign country and a corporation organized under the laws of the designated country "or which on or since ... [the] effective date was or has been controlled by ... directly or indirectly, a [designated] foreign country and/or one or more nationals thereof ..."

Than challenged the Secretary's decision in the instant suit filed on June 23, 1977.[7] Than claimed that the Regulations were inapplicable to his application because there was no designated national having an interest in the funds. He alternatively claimed that if there was a designated national with such an interest the Secretary abused his discretion by failing to issue a license unblocking the funds. Than further alleged that the Secretary's

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[7] The district court found that Than was authorized to bring the action on behalf of himself and the other shareholders by the shareholder-directors known to have successfully fled Vietnam. The issue of Than's capacity too sue is not before us on appeal.

refusal to issue a license was (1) contrary to the Fifth Amendment's prohibition against the taking of property without just compensation; (2) impermissibly discriminated against aliens in violation of the Fourteenth Amendment; and (3) violated his rights under the 1961 Treaty of Amity and Economic Relations between the United States and the Republic of Vietnam.[8]

The district court entertained cross-motions for summary judgment and entered judgment for the Secretary. The court upheld the Secretary's decision not to issue an unblocking license, finding that the Bank was a designated national under the Regulations and that the Secretary's determination that the Bank was not dissolved by the April 15 Resolution was not "arbitrary, capricious, an abuse of discretion, or contrary to law." The court further

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[8] 12 U.S.T. 1703 (1961).

found no constitutionally impermissible taking nor any violation of equal protection and concluded that the Treaty relied upon by Than terminated upon the fall of the Republic of Vietnam and, thus, could not support his claim.

II. STANDARD OF REVIEW

The district court reviewed the action of the Secretary, acting through the office of the Foreign Assets Control, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§701 et seq. Than contends that this was in error. He asserts that the Secretary's decision should have been reviewed under §9(a) of the TWEA, 50 U.S.C.App. §9(a). Than's assertion is incorrect.

Section 9(a) of the Act authorizes "[a]ny person not an enemy or ally of enemy[9] claiming any interest, right, or title in

[9] The terms "enemy" and "ally of enemy" are specifically defined in §2 of the TWEA 50 (cont'd. next page)

any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the [United States Government] or seized by [it]" to seek return of the property through an adminstrative proceeding or through a suit in federal district court.

Judicial review of the Secretary's denial of an unblocking license does not lie under §9(a) because that section provides a means "through which eligible persons may seek recovery of property seized under the [TWEA]. Cornet Stores v. Morton, 632 F.2d 96, 98 (9th Cir. 1980) (emphasis added). Than cites no evidence in the record that the Army payments have been "conveyed, transferred, assigned, delivered or paid) or otherwise seized by the United States government. The blocking of

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U.S.C.App. §2. It is conceded that Than is not an "enemy" or "ally of an enemy" as defined in that section.

the assets represented by the Army contract payment does not affect the interest, right or title to them which Than may possess. See Nielsen v. Secretary of the Treasury, 424 F.2d 833, 844 (D.C.Cir. 1970). The blocking action merely suspends indefinitely the right to transfer those funds.

Than contends that if §9(a) is not construed to provide the jurisdictional predicate for judicial review of the Secretary's decision, he will be left without a remedy because §7(c) of the TWEA[10] precludes such review under the Administrative Procedure Act. This contention is without merit. Section 7(c) limits the relief or

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[10] Section 7(c) of the TWEA, 50 U.S.C.App. Section 7(c) provides in pertinent part:

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the [Government] or required so to be, or seized by [it] shall be that provided by the terms of this Act ...

remedy of any person having any claim to property which has been conveyed, transferred, assigned, delivered or paid to the government to that provided in the TWEA. As discussed above, however, there is no evidence that the assets at issue were ever conveyed to or seized by the federal government. Section 7(c), therefore, is inapplicable to this case and does not preclude judicial review of the Secretary's decision to deny an application for an unblocking license.

Section 10 of the APA, 5 U.S.C §701(a), provides that "each authority of the Government of the United States" is subject to judicial review "except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." This section creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would

be inappropriate. Dunlop v. Bachowski, 421 U.S. 560, 567, 95 S.Ct. 11851, 1857, 44 L.Ed.2d 377 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510-1511, 18 L.Ed.2d 681 (1967); State of Washington v. Environmental Protection Agency, 573 F.2d 583, 587-88 (9th Cir. 1978).

Judicial review of the Secretary's decision to deny Than's application for an unblocking license is not precluded by either exception of section 701(a). We find nothing in the legislative history of the TWEA which prohibits such review either expressly or by implication. There simply has been no "showing of 'clear and convincing evidence' of a ... legislative intent ... [to] restrict access to judicial review." Abbott Laboratories v. Gardner, supra, 387 U.S. at 141, 87 S.Ct. at 1511. We

conclude, therefore, that the district court was correct in reviewing the Secretary's decision under the Administrative Procedure Act.[11]

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[11] Appellant's contention that the district court was incorrect in reviewing the Secretary's decision under §706 is erroneous. That section provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret consitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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III. DESIGNATED NATIONAL

In the February 22, 1977, letter denying Than's application for an unblocking llicense, the Secretary stated:

> The Dong Phuong Bank, a Vietnamese corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in the funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Ofice.
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> The actions of the shareholders and the directors of the Bank described in the Application were ineffective to dissolve it or transfer its assets. The Resolution signed by the directors of the bank ten days prior to the fall of Viet-Nam stated that its intent was to allocate management and control of the United States assets of the Bank to the shareholders who left Saigon prior to its fall. The Resolution did not even purport to transfer the bank's interest in the United States assets to those shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Vietnam. Accordingly, there was neither a dissolution nor a

transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Vietnam.

Than contends that the Secretary abused his discretion in refusing to grant him a license for several reasons. First, he maintains that there is no designated national with an interest in the assets at issue because the Bank ceased to exist prior to the effective date and was not, therefore, a corporation with an interest in the funds which would be subject to the blocking provisions of the Regulations. He argues that the April 15, 1975, shareholder-director Resolution dissolved the corporation prior to April 30 and transferred its United States based assets to those shareholders who fled Vietnam. Than argues that the Secretary erred in failing to give effect to this Resolution. We cannot say that the Secretary's interpretation of the

Resolution based on the facts before him[12] was arbitrary, capricious, an abuse of discretion, or contrary to law. The meaning of the Resolution is at best ambiguous and the document does not, by its terms, conclusively establish an intent to dissolve the corporation. It merely provides that the

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[12] Than contends that the Secretary should have considered the Resolution in light of the chaotic circumstances under which it was adopted. None of the information with respect to those circumstances nor the purported meaning and intent of the Resolution was furnished to the Secretary, however. We may not, therefore, consider those assertions when analyzing whether the Secretary's denial of the license application was arbitary, capricious, an abuse of discretion or otherwise not in accordance with law. Because we are limited to a review of the adminstrative record that was before the Secretary at the time of his decision, we may not consider some new record that was made in the district court subsequent to the Secretary's decision. See Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973).

Moreover, even if the document by its terms clearly manifested an intent to dissolve the Bank or Than adduced evidence in his application to support that claim, the Resolution would have been ineffective to dissolve the Bank. By Than's own admission, corporate dissolutions were forbidden in the waning days of the South Vietnamese government. In general, affect must be given to the law of the situs wherein the Bank was incorporated and operated. Nielson v. Secretary of the Treasury, 424 F.2d 833, 842 (D.C.Cir. 1970).

shareholders managing to flee Vietnam should have the authority to "manage and make use of" the Bank's overseas assets. No mention is made of any authorization for those shareholders to own those assets outright. Because a rational nexus existed between the facts presented in the application before the Secretary and his determination that the Resolution did not effect a dissolution, we may not set aside that determination. See Certified Color Manufacturers Association v. Mathews, 543 F.2d 284, 294 (D.C.Cir. 1976).

Than contended alterntively that even if the Resolution was ineffective to dissolve the Bank, the Bank was seized and destroyed upon the fall of Saigon shortly before the Regulations became effective as to South Vietnam. This issue, however, was not before the Secretary,[13] and it was not

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[13] Although Than raised the issue of confiscation in his application, he did not contend that the

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a basis for his decision to deny the license. Than may not, therefore, raise the issue for the first time before the district court or upon appeal.[14]

IV. OTHER CLAIMS

Than asserts that even if the Bank technically was a designated national, the Secretary abused his discretion in not piercing the Bank's corporate veil and as-

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Bank was confiscated prior to the effective date. Moreover, he did not proffer any evidence of the date on which the confiscation allegedly occurred. The only reference to such a date is an ambiguous statement is the application:"On or before September 1, 1975, the Communist Government of Vietnam nationalized all privately-held banks in Vietnam. Since then, the Dong Phuong Bank has not operated in Vietnam as a private bank at all ..." (emphasis added).

[14] Although the district court noted that no evidence of a "pre-effective date" seizure was presented to the Secretary, the court addressed and disposed of that issue. It was erroneous for the court to have done so. That issue was not present in the administrative record nor considered by the Secretary. The court is limited in its review of agency action to the administrative record already in existence. It is not permitted to review some

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cribing its interest in the Army contract payments to the Bank's shareholders.[15] In our view, however, the Secretary's decision to treat the Bank as a corporate entity with an interest in the assets at issue is based upon the reasonable premise that the Vietnamese government has an interest in Vietnamese corporations. See Nielson v. Secretary of the Treasury, supra, 424 F.2d at 842. The reasonableness of this assumption

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new record made initially in the reviewing court. See Camp v. Pitts, supra, 411 U.S. at 142, 94 S.Ct. at 1244. The court's action does not constitute reversible error, however, because the court also upheld the Secretary on the basis of the Secretary's decision that the Bank was a designated national within the meaning of the Regulations.

[15] Than relies on Kaufman v. Societe Internationale, 343 U.S. 156, 72 S.Ct. 611, 96 L.Ed 853 (1952), for the proposition that the Secretary should pierce the Bank's corporate veil and give effect to Than's claim. Such reliance is misdirected. Kaufman involved a challenge to the vesting of assets under §9(a) of the TWEA. Furthermore, that decision was based on an interpretation of a particular federal statute regarding the distribution of German an Japanese assets vested after the war. As noted earlier, however, the instant case does not involve the vesting of the Bank's assets under §9(a).

is underscored by the possibility that the P.R.G. may declare itself to be the successor of the Bank via expropriation and may, at any time, seek to assert such an interest.

Than asserts that the P.R.G. has no interest in the Bank's American-based assets by virtue of its alleged expropriation of the Bank. He argues that any claim to an interest in those funds by the P.R.G. derives from a confiscatory taking of the Bank in South Vietnam which would not be given legal effect by our courts because of the territorial limitation on the act of state doctrine. Since the P.R.G. could not have acquired a recognized interest in the funds, Than argues, no legal basis exists for blocking these assets. This argument is incorrect.

The judicially created act of state doctrine provides that the courts of this country "will not examine the validity of a

taking of property within its own territory by a foreign sovereign government ... even if the complaint alleges that the taking violates customary international law." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964). The territorial limitation on the doctrine provides that this forbearance does not extend to property in the United States which a foreign government attempts to take without compensation. "[O]ur courts will not give 'extra-territorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals." Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1025 (5th Cir.), cert. denied, 409 &.S. 1060, 93 S.Ct. 555, 34 L.Ed.2d 512 (1972), quoting F. Palicio y Compania v. Brush, 256 F.Supp. 481, 488 (S.D.N.Y. 1966); see Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 687, 96 S.Ct. 1854, 1857, 48 L.Ed.2d 301 (1976).

The decision of the Secretary did not propose to nor in fact give an extra-territorial effect to any alleged expropriation by the P.R.G. of the Bank's assets in the United States. Neither the decision of the Secretary nor the judgment of the district court purported to determine title to the assets at issue. Rather, the Secretary's decision simply continues in effect the temporary blocking of the transfer of those assets until a resolution of American claims is made or some other political agreement is reached with the P.R.G.

Than's arguments that the blocking of the Bank's United States assets constitutes an unconstitutional taking without just compensation and violates his right to equal protection of the laws are unpersuasive. The Trading with the Enemy Act and the Regulations promulgated pursuant thereto with respect to "blocking received the constitutional imprimatur of the Supreme

Court in Propper v. Clark, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). In Propper the Court upheld the President's "freezing" order issued pursuant to §5(b) of the TWEA which prohibited certain transactions involving Austrian property except as they were specifically licensed by the Secretary of the Treasury. In upholding the TWEA and the Executive Order, the Court stated:

> The power in peace and in war must be given generous scope to accomplish its purpose. Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the us of assets that happened to be in this country. To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest. That fact, however, cannot lead us to narrow the broad coverage of the Executive Order.

Id. at 481-82, 69 S.Ct. at 1339.

We recognize that blocking involves a deprivation of the enjoyment of a property

interest. That deprivation is temporary, however, and is not equivalent to vesting. Vesting occurs when title to assets is transferred to the government; blocking does not transfer title but rather prohibits temporarily, transactions involving those assets. We also recognize that an action intended by the government to be a temporary block on any transactions involving those assets may amount to an interminable denial of property to the individual who must await the often slow and labyrinthian course of international relations. The possibility remains, however, that the President and the Congress may decide that resumption of diplomatic and economic intercourse with the South Vietnamese government would be in our national interest.

Such a development of course might obviate the need to classify South Vietnam as a designated foreign country and to block

transactions involving assets associated with that nation. See Nielsen v. Secretary of the Treasury, supra, 424 F.2d at 843-845.

We conclude that the blocking program with respect to the assets at issue does not constitute a constitutionally cognizable taking without just compensation.

We also find unpersuasive Than's contention that the Secretary's refusal to issue an unblocking license denies him equal protection as guaranteed by the Fifth Amendment.[16] Than speculates that the rationale for denying his application was that some of the other shareholders of the Bank resided outside of the United States. He also contends that he was denied his

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[16] The Fifth Amendment's due process clause "encompasses equal protection principles." Mathews v. DeCastro, 429 U.S. 181, 182 n. 1, 97 S.Ct. 431, 432, 50 L.Ed.2d 389 (1976); Weinberger v. Salfi, 422 U.S. 749, 768-770, 95 S.Ct. 2457, 2468-2469, 45 L.Ed.2d 522 (1975).

right to equal protection because the Secretary has a policy of granting licenses to Vietnamese sole proprietors and members of partnerships resident outside Vietnam but not to Vietnamese shareholders of defunct corporations resident outside Vietnam. Both contentions are without merit.

With respect to Than's first contention, the Secretary did not deny an unblocking license on the basis of the residence of any of the other shareholders outside of Vietnam. The license was denied because the Secretary determined that the Dong Phuong Bank is a designated national within the meaning of the Regulations and because he determined that the corporation had not been dissolved prior to the effective date of blocking.

Nor do we find a violation of equal protection with respect to Than's second contention. Even assuming arguendo that the Secretary distinguishes between the

applications of sole prorietors and partnerships and those of corporate shareholders, we do not find a violation of Than's constitutional rights. "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." (Footnotes omitted). Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976)(per curiam).

The alleged classification between a sole proprietorship or partnership and a corporation does not impact upon a fundamental right or a suspect class. It is not, therefore, subject to strict judicial scrutiny. Traditional equal protection analysis provides, however, that a legislative classification which admittedly does not concern a fundamental right or a

suspect class may be unconstitutional if the classification is not rationally related to a legitimate governmental interest. See United State Department of Agriculture v. Moreno, 413 U.S. 528, 533, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973); McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The governmental interests which arguably justify the blocking provisions of the TWEA and the Regulations are threefold: (1) to prevent designated countries from acquiring dollars: (2) to provide a fund from which United States citizens could be compensated for injury occasioned them by designted countries; (3) and to use the blocked funds as a negotiating tool with the designated country.[17] Any classification by the Secretary which discriminates

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[17] These purposes were articulated in S. Somerfield, Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba, 79 Bus.Law, 861, 862 (cont'd. next page)

against Than as a corporate shareholder, therefore, must be related to at least one of the above three enumerated interests.

It is not unreasonable to assume that assets owned by an entity incorporated under the laws of South Vietnam are assets in which the P.R.G., as the successor government, has an interest. See Nielsen v. Secretary of the Treasury, supra, 424 F.2d at 842. Nor is it unreasonable to acknowledge the possibility that a foreign country would assert an interest in the assets of corporations organized under its laws. There is no comparable legal basis, however, for the P.R.G. to assert an interest in the United States based assets of a sole proprietorship or partnership owned by an

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(1964). See also Richardson v. Simon, 560 F.2d 500, 505 (2d Cir. 1977); Real v. Simon, 510 F.2d 557, 564 (5th Cir. 1975). Although Richardson and Real articulated the purposes behind the Cuban Assets Control Regulations, the government admits in its brief that the purposes behind those Regulations and the Foreign Assets Control Regulations are virtually identical.

American resident alien who had once been a South Vietnamese citizen.

Because the P.R.G. is in a position to assert an interest in the Bank's assets held in this country, it is conceivable that the United States could use the blocked funds as a diplomatic negotiating tool.[18] Such use would serve a legitimate governmental interest. We conclude, therefore, that the Secretary's differing classification between sole proprietorships or partnerships and corporations is rationally related to a legitimate governmental interest. Accordingly, we find no violation of Than's consitutional right to equal protection.

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[18] It is not insignificant that blocked assets were used as an instrument in the successful negotiations leading to this nation's establishment of diplomatic relations with the People's Republic of China in 1979 and in the resolution of the American hostage crisis in Iran this year.

V. THE NAVY PAYMENT

Than also sought declaratory relief that $29,975.44 which he received indirectly from the Navy through a Vietnamese contractor should not be placed into a blocked account. As noted above, in denying Than's application for an unblocking license, the Secretary stated that the Navy payments must be traced and placed into blocked accounts. The Secretary did not file a counterclaim to Than's suit seeking relief with respect to the Navy funds and Than has not applied for a license with respect to those funds.

In granting the government's motion for summary judgment the district court concluded that "the actions of the Secretary in blocking the United States based assets of the Bank and declining to issue an unblocking license were within his authority." Tran Qui Than v. Blumenthal, 469 F.Supp. 1202, 1212 (N.D.Cal.1979). Argua-

bly, the judgment for the government means that the Navy funds must be placed into blocked accounts. The district court decision, however, is ambiguous on this point. We therefore, remand the case to the district court for a determination of whether the Navy funds must be placed into a blocked account.

We note that on remand the district court must determine not only whether the funds should be blocked, but if so, what amount of the payment, if any, is subject to blocking. Only a portion of the Navy payment was ultimately kept by Than. There are, therefore, equitable considerations as to whether Than should be responsible for tracing any or all of those funds. Moreover, because these funds were paid to the Vietnamese contractor by the Navy without any notification whatsoever that the funds were subject to being blocked, and because the payment was made several years

ago, there may be a question of whether the government attempt to now block those funds is barred by laches.

The judgment of the district court is AFFIRMED in part and REMANDED in part for consideration consistent with this opinion.

APPENDIX B

TRAN QUI THAN,

Plaintiff-Appellant,

v.

Donald T. Regan

Defendant-Appellee.

No. 79-4299.

United States Court of Appeals,

Ninth Circuit

Order

March 1, 1982

Appellant's motion for reconsideration of decision dated October 13, 1981 affirming in part decision of federal district court for the Northern District of California is denied.

APPENDIX C

TRAN QUI THAN, Plaintiff,

v.

W. Michael BLUMENTHAL, Defendant.

No. C-77-1361-WWS.

United States District Court

N. D. California,

April 27, 1979

MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

William W. Schwarzer, District Judge

Section 500.201 of the Foreign Assets Control Regulations ("Regulations"), 31 C.F.R. Part 500, prohibits, except upon specific authorization by the Secretary of the Treasury, transactions involving United States based property in which a designated foreign country or a national thereof has an interest. South Vietnam is

a designated foreign country. Plaintiff, a shareholder in a South Vietnam bank, the Dong Phuong Bank ("Bank"), claims an interest in funds owed by the United States Government to the Bank. The Secretary of the Treasury has ruled that the Bank is a "designated national" and that the funds are therefore blocked pursuant to the Regulations, and has refused to issue an unblocking license. The parties' cross-motions for summary judgment raise two issues. First, did the Secretary err in determining that the Bank is a designated national and therefore subject to the Regulations' blocking provisions? Second, did the Secretary err in not issuing a license unblocking the funds owed to the Bank?

I. Statement of Facts

The Dong Phuong Bank was a private commercial bank established in 1968 under the laws of the Republic of Vietnam. As of

April 30, 1975, when South Vietnam fell to the communist forces, a small group of shareholders owned the Bank's stock. All the shareholders were nationals and residents of Vietnam. The Bank's 11 directors owned more than 80 percent of the outstanding shares. Plaintiff was the principal shareholder, owning 13 percent of the outstanding shares, and served as a director and as president of the Bank.

Plaintiff fled Vietnam on April 25, 1975, and currently resides in Berkeley, California. He entered the United States as a refugee with parole status granted by the Attorney General under Section 1182-(d)(5) U.S.C. § 1182(d)(5). Of the eleven shareholder-directors, seven left Vietnam in anticipation of the communist takeover, one remained in Vietnam, one was captured and imprisoned while attempting to leave Vietnam, and the fate of the remaining two shareholder-directors is unknown. The

three shareholder-directors known to be residing in the United States (plaintiff and two others) account for 18 percent of the Bank's stock; those in France and Hong Kong hold 38 percent; those known to be in Vietnam hold 30 percent; and those whose location is unknown hold 14 percent.

On April 15, 1975, the shareholder-directors met to consider what action they should take in light of the impending fall of Vietnam. They adopted a resolution providing that those members of the management board "who will be able to leave the country will be qualified to manage and to make use of all the . . . properties that the [Bank] possesses abroad." This resolution was to be "enforced beginning the day when . . . Saigon . . . will be occupied by the Communist government."

Saigon fell and resistance ended on April 30, 1975. On May 1, the Provisional Revolutionary Government of Vietnam

("P.R.G.") issued a communique directing that "banks . . . will be confiscated and from now on, managed by the revolutionary administration." Plaintiff maintains that the Bank was confiscated and destroyed on April 30, and that the communique confirmed this fact. Defendant argues that the Bank continued to function until August 1975. It is undisputed, however, that the Bank, in whatever form it may currently exist, and its assets are now controlled by the P.R.G.

As of April 30, 1975, the Bank was the assignee of monies owed to certain Vietnamese contractors under several construction, maintenance, and supply contracts with the United States Army and Navy. The assignments were made in consideration of the issuance of performance bonds, running to the benefit of the United States, guaranteeing performance by the Vietnamese contractors, and in consideration of the

loan of working capital to the Vietnamese contractors. The contractors had entirely performed their contracts before the fall of Vietnam; however, on that date, the United States still owed a residual sum to each contractor. The contractors have since come to the United States as parolee-refugees.

At an unspecified time after arriving in the United States, plaintiff sought payment from the Army of the $221,235 which it owed under the contract. The Army refused to make this payment, stating that the money was blocked pursuant to Section 500.201 of the Regulations, and that to receive the funds it was necessary to obtain a license from the Secretary of the Treasury. At another unspecified time, plaintiff signed a release on behalf of the Bank of the Bank's claims as assignee of the sum due from the Navy. The Navy then paid $49,965 to Tran Ngoc Tuan, one of the Viet-

namese contractors now residing in the United States, which represented the total amount due under the contracts with the Navy. He in turn paid $29,975.44 to plaintiff.

On December 22, 1976, plaintiff applied to the Treasury Department's Office of Foreign Assets Control for a license to unblock the sum owed to the Bank by the Army. On February 22, 1977, the Office of Foreign Assets Control, acting on behalf of the Secretary of the Treasury, denied plaintiff's application, giving the following reasons:

> The Dong Phuong Bank, a Vietnamese corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Office.

The letter of denial also stated that the sums already paid by the Navy were blocked under Section 500.201 and contained subpoenas requesting information about these payments.

Plaintiff filed the instant action on June 23, 1977. As amended, the complaint seeks a declaration that the Foreign Assets Control Regulations are inapplicable in this case, there being no "designated national" having an interest in the funds, and that the funds due from the Navy and the Army thus may not properly be blocked. Alternatively, if the Court finds that there is a designated national with an interest in the funds, the complaint seeks declaratory relief requiring defendant to issue a license unblocking the funds. Plaintiff has been authorized by the shareholder-directors known to have left Vietnam to assert their interests as well in this action.

II. Capacity to Sue

Defendant has challenged plaintiff's capacity to sue on the ground that Tran is not the real party in interest. Fed.R.-Civ.P. 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest." But Rule 17(a) also states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Plaintiff has brought this action, on behalf of himself and other shareholders, as a shareholder of a Vietnam bank, the present legal status of which is unsettled. Plaintiff asserts that as a result of certain events, he now has an interest in funds owed to the Bank by the United States Government. Plaintiff's claims thus make him

a real party in interest. Moreover, neither ratification by the Bank nor its substitution or joinder as plaintiff is feasible. Defendant will suffer no prejudice for there is no reason why he cannot assert against plaintiff any defenses which he could have asserted against the Bank; plaintiff can claim a share only of assets to which the Bank had a rightful claim. Defendant's motion to dismiss for lack of capacity must therefore be denied.

III. Scope of Review

Judicial review of the action of the Secretary of the Treasury, acting through the Office of Foreign Assets Control, is authorized by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. Section 706 defines the scope of review in this Court:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional

and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

These standards apply except when an adjudicatory hearing is required, in which case the administrative record is reviewed under a "substantial evidence" standard. (§706(2)(E)). In the present case, no act or regulation requires an adjudicatory hearing. Section 500.801(b)(3) of the Regulations states that an applicant for a special license may arrange to make an "oral presentation" or elect to "argue the application." Plaintiff did not request an oral presentation or argue the application. Review of the Secretary's decision is thus limited in scope by the powers of review

granted in the preceding provisions of Section 706.

IV. The Classification of the Dong Phuong Bank as a Designated National

Plaintiff argues that the Secretary of the Treasury determined incorrectly that the Bank is a designated national whose United States based funds are subject to blocking under the Foreign Assets Control Regulations.

One statute and three provisions of the Regulations form the basis for the Secretary's decision. As of February 1977, Section 5(b) of the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), provided that during war or any period of national emergency the President may prohibit "transactions involving any property in which any foreign country or a national thereof has any interest." Section 500.201 of the

Foreign Assets Control Regulations, promulgated under the Act and applicable here, bars transactions (unless specifically authorized by a license) that "involve [U.S. based] property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect." The "effective date" is the date when the country is listed as a designated foreign country. Under Section 500.302, the term "national" includes a citizen of a designated foreign country and a corporation organized under the laws of the designated country "or which on or since . . . [the] effective date was or has been controlled by . . . directly or indirectly, a [designated] foreign country and/or one or more nationals thereof." Under Section 500.305, the term "designated national" includes all individuals and

corporations previously defined as "nationals.

On their face, the Regulations apply to the Dong Phuong Bank as the Secretary has determined. South Vietnam was classified as a designated country at 12:00 p.m. Eastern Daylight Time on April 30, 1975. By virtue of having been organized under the laws of Vietnam, the Bank became a national, and, in turn, a designated national, on that date. Because the Bank held an interest as of April 30, 1975, in the funds due from the United States Government, this interest became blocked and could not be transferred without a license.

Plaintiff does not dispute that the Regulations, so interpreted, apply to block the transaction at issue here. But he argues that two events --the April 15, 1975, shareholder-directors' resolution and the pre-effective date seizure of the Bank by the P.R.G.-- render the Regulations

inapplicable.

A. April 15 Shareholder's Resolution

The April 15, 1975, resolution of the shareholder-directors provided in pertinent part:

> Accordingly, the Management Board decides that those among the Management Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phuong Bank in banks located out of Vietnam as well as all the properties that the Dong Phuong Bank possesses abroad.
>
> * * * * * *
>
> The present decision will be enforced beginning the day when the Saigon metropolis will be occupied by the Communist government.

Tran maintains that the resolution was intended to dissolve the portion of the Bank existing in Vietnam, to preserve the de facto existence of the corporation outside Vietnam, and to transfer the interest in the Bank's foreign assets to shareholder-directors who escaped from Vietnam. According to plaintiff, the Bank

could therefore not have been classified by the Secretary as a designated national.

The denial letter of February 22, 1977, rejected this claim:

> The actions of the shareholders and directors of the Bank described in the Application were ineffective to dissolve it or transfer its assets. The Resolution signed by the directors of the bank ten days prior to the fall of Vietnam stated that its intent was to allocate management and control of the United States assets of the Bank to the shareholders who left Saigon prior to its fall. The Resolution did not even purport to transfer the Bank's interest in the United States assets to these shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Vietnam. Accordingly, there was neither a dissolution nor a transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Vietnam.

The Secretary's interpretation of the resolution cannot be said to be arbitrary, capricious, an abuse of discretion, or contrary to law. By its own terms, the resolution did no more than allocate management and control of the Bank's foreign assets,

contingent upon the fall of Saigon. It mentioned nothing about a dissolution of the Bank, a change in its domicile, or a transfer of its assets. Plaintiff states that in the chaotic and dangerous situation during the final days of the Republic of South Vietnam, that resolution came as close to dissolving the corporation as the shareholders dared come. Plaintiff does not contend, however, that the resolution was sufficient under Vietnamese law to dissolve the Bank or transfer any of its assets to the shareholders; indeed, such a dissolution or transfer would, according to plaintiff, have been illegal under Vietnamese law.

B. Seizure of the Bank by the P.R.G.

Plaintiff contends that the Bank was seized and destroyed as an entity upon the fall of Saigon shortly before the Regulations became effective as to South Vietnam.

It is his position that the Bank was merged into the National Bank of Vietnam immediately upon its seizure, and that it never again functioned, either as a private bank or as a government-managed corporation, independent of the National Bank of Vietnam. Because the Bank ceased to exist prior to the "effective date," plaintiff argues, it never had an "interest" in the funds, which therefore never became subject to the blocking provisions of the Regulations.

Plaintiff has submitted affidavits stating that the Bank did not function after April 30, 1975, along with the May 1 communique from the P.R.G. which ordered the confiscation of all banks. Defendant responds that the May 1 communique did not "merge" the Bank into the National Bank but merely announced that the Saigon Military Management Committee assumed direction of all banks. He agrees that the P.R.G. ordered all private banks to close their

doors to customers on April 30, 1975, according to defendant's interpretation of two communiques from the P.R.G., the P.R.G. ordered private banks (specifically including the Dong Phuong Bank) to reopen for a period of two months and settle their accounts with depositors and shareholders; after the two-month period, the banks were to close, with the National Bank of Vietnam assuming control over the country's banking services. Defendant argues that the expropriation and merger of the private banks did not occur until after this two-month period had elapsed.

Because the parties did not present this evidence to the Secretary, he did not address this issue in his letter of denial. However, the issue raised by plaintiff is not material to the resolution of this case. Under either interpretation of the evidence, the Regulations are applicable. Under the facts offered by the government

(i.e., that the Bank continued operations after the effective date, albeit under P.R.G. direction), the Bank is a designated national with an interest in the funds owed by the United States Government. The funds may therefore be blocked. Under the factual situation presented by plaintiff (i.e., that the P.R.G. destroyed the Bank and seized its assets prior to the effective date), the P.R.G. directly or indirectly became the successor-in-interest to all the Bank's claims. The Regulations prohibit transactions in property in which a designated foreign country has had an interest since the effective date.

For the purpose of this summary judgment motion, the Court will consider the facts in the light most favorable to plaintiff. Assuming, therefore, that the Bank as an entity ceased to exist before the effective date, its assets, having been taken over by the P.R.G., were clearly

subject to being blocked. Plaintiff admits that had the Bank carried on business after the effective date, the funds in dispute could properly be blocked. Nielsen v. Secretary of Treasury, 137 U.S.App.D.C. 345, 424 F.2d 833 (1970). Plaintiff attempts to distinguish the present case from Nielsen in that the bank was not a functioning corporation on the effective date. But a fund belonging to a bank expropriated by Vietnam surely qualifies as "property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect." 31 C.F.R. §500.201. A government with the power to exproriate also has the power to assert a claim as the successor to an expropriated bank's foreign-based assets. It is clear, therefore, that the mere fact of expropriation by Vietnam prior to the effective date does

not distinguish this case from Nielsen.

V. The Refusal to Issue a License Unblocking Funds

Plaintiff argues further that, in any event, the Secretary erred in not issuing a license unblocking the Bank's United States based assets. In plaintiff's view, the Secretary's failure to issue a license conflicts with the territorial limitation of the act of state doctrine, and plaintiff's constitutional and treaty rights.

A. Effect of the Territorial Limitation of the Act of State Doctrine

Tran argues that the territorial limitation of the act of state doctrine bars any claim to the United States based assets derived through the expropriation of the Bank. Inasmuch as no designated country or national could therefore have acquired an interest, no legal basis exists for block-

ing these assets.[1]

The classic statement of the act of state doctrine, quoted in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), appears in Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of

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[1] Although plaintiff has not fully articulated it, the logical extension to his argument is that application of the Regulations to the assets of a corporation expropriated before the effective date is improper for it is not within the scope of the authorizing statute, Section 5(b) of the Trading with the Enemy Act, supra. But that Act grants broad powers to the President. Regulations issued pursuant to the Act are valid if they carry out a purpose of the authorizing statute. See Ruiz v. Morton, 462 F.2d 818, 822, (9th Cir. 1972), aff'd., 415 U.S. 199 (1974). The purposes articulated for blocking under the Act include (1) keeping hard currency away from certain countries, Veterans & Reservists for Peace in Vietnam v. Regional Commissioner, 459 F.2d 676 (3d Cir. 1972) and (2) preserving assets for future claims satisfaction, Nielsen v. Secretary of Treasury, supra, 424 F.2d 833. See Sommerfield, "Treasury Regulations Affecting Trade With the Sino-Soviet Bloc and Cuba," 19 The Business Lawyer 861 (1964). While the Secretary does not contend that Tran might turn the blocked assets over to Vietnam, he does contend that blocking assets in which Vietnam may assert an interest for future claims satisfaction.

> one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The Court in Sabbatino, supra, 376 U.S. at 428, 84 S.Ct. at 940, explained that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government....even if the complaint alleges that the taking violates customary international law." This forbearance on the part of American courts does not extend, however, to property in the United States which a foreign government attempts to take without compensation. "'Our courts will not give "extra-territorial effect" to a confiscatory decree of a foreign state, even where directed against its own nationals.'" Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1025 (5th Cir.), cert. denied, 409 U.S. 1060, 93 S.Ct. 555, 34

L.Ed.2d 512 (1972), quoting F. Palico y Compania, S.A. v. Brush, 256 F.Supp.481, 488 (S.D.N.Y.1966), aff'd mem., 375 F.2d 1011 (2d Cir. 1967).

On the strength of the territorial limitation, plaintiff argues that neither Vietnam, nor anyone whose claim derives from the confiscation by the P.R.G., would be able to recover in the United States courts the sum claimed by Tran because those courts would refuse to honor that confiscation with reference to United States based assets. Maltina Corp. v. Cawy Bottling Co., supra; Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed.2d 260 (1968). But that, of course, is not the question before the Court. Vietnam is not a party to this action, and the validity of the confiscation is not in issue. What Tran seeks to do here is to convert a shield against the

enforcement of claims derived from foreign expropriation into a sword to frustrate the marshalling by the Executive Branch of assets to which a foreign government may lay claim in the future. In the territorial limitation cases, the courts have refused to give effect to confiscations in resolving disputes over ownership between the original owners and a party claiming through the confiscation. The question in those cases was whether a foreign government, or its assignee, would be able to enforce a confiscatory decree within the United States against United States based assets. Here no such issue arises, for the Court does not decide who will be entitled to the funds.

In answer, Tran argues that Vietnam would be getting the benefit of its confiscation of the Bank if the blocked assets are used in any claims settlement: Vietnam would in effect be paying the claims of

American citizens with blocked United States based funds, instead of using money from its treasury. But there is no way for this Court to know what, if any, claims settlement arrangements may be made in the future. This is a matter in the hands of the President and Congress. Speculation on possible savings to Vietnam's treasury therefore affords no basis for this Court to rule that the territorial limitation principle requires the Secretary to unblock the claimed funds.

B. Constitutional Laws

Tran further contends that the Secretary's blocking action amounts to a governmental taking without compensation. That contention must be rejected. Blocking is by its nature only a temporary action. Neither the Bank nor Tran has been divested by United States Government action of whatever right, title or interest either may have.

Tran argues that the Secretary may block the funds indefinitely. The Court recognizes that an indefinite blocking, if it "effectively deprive(s) an alien of substantially all the beenefit of his interest in property," ALI Restatement 2d, Foreign Relations Law of the United States § 192 (1965), could be a taking under international standards. But nothing before the Court indicates how long the funds may be blocked. Moreover, as the earlier discussion of the effect of the April 15 resolution shows, Tran has failed to establish that he and his fellow shareholders have a constitutionally protected property interest in the claims owned by the Bank.

In an effort to establish an ownership claim, plaintiff points to decisions in which courts have pierced the corporate veil to recognize equitable claims of shareholders to corporate assets. See Kaufman v. Societe Internationale, 343 U.S.

156, 72 S.Ct. 611, 96 L.Ed.853 (1952); Pernikoff v. Kennedy, 219 F.Supp. 854 (D.D.C.1963). These cases have no application here. In Pernikoff, the corporation was merely a shell or dry trust which existed for the benefit of its sole shareholder. And, as the court pointed out in Nielsen v. Secretary of Treasury, supra, 137 U.S.App.D.C. at 354 55, 424 F.2d. at 842 43, the issue in Kaufman arose in connection with the permanent disposition of alien property, not its preservation for future disposition. With respect to the latter, the broad sweep of the government's power was recognized in United States v. Pink, 315 U.S.203, 228, 62 S.Ct.552, 564, 86 L.Ed. 796 (1942), where the Court said:

> To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment. Russion Volunteer Fleet v. United States, 282 U.S.481, [51 S.Ct. 229, 75 L.Ed. 473]. A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of

> foreign countries and whose claims arose abroad. Disconto Gesellschaft v. Umbreit, 208 U.S. 570 [28 S.Ct. 337, 52 L.Ed. 625]. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts.

See also Nielsen v. Secretary of Treasury, supra, 137 U.S.App.D.C. at 358, 424 F.2d. at 846.

Those same considerations also dispose of plaintiff's equal protection claim. The fact that the Secretary may in the exercise of his discretion unblock assets of corporations confiscated by the Cuban government and primarily owned by United States citizens does not render the instant blocking a violation of plaintiff's constitutional

rights.[2] It cannot be said to be unreasonable for the Secretary to distinguish between claims by United States citizens and claims of nationals of the country whose government has confiscated their

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[2] The Secretary's action respecting assets of Cuban corporations primarily owned by American citizens was taken in response to Congressional direction:

> [T]he Committee on Foreign Relations recommends that upon application the Department of the Treasury examine with particular care each case involving Cuban assets beneficially owned by American citizens to determine whether those assets should continue to be blocked. In the committee's view, if the assets are wholly or substantially owned by citizens and residents of [the] United States they should be unblocked, since it is possible that such assets may be placed in a fund at some future date and used to pay the claims of American citizens against the Cuban Government. This would be tantamount to using the property of one U.S. citizen to pay the claim of another U.S. citizen.

Senate Report 701, 1965 U.S.Code Cong. & Admin.-News, pp. 3581, 3585.

property. See United States v. Pink, supra.[3]

C. Other Contentions

Plaintiff's other contentions are without merit. He invokes the provisions of the 1961 Treaty between the United States and the Republic of Vietnam which contain assurances that neither party shall take the property of nationals of the other without just compensation. T.I.A.S NO. 4890; 12 U.S.T. 1704 et seq., Art. IV. These provisions, however, add nothing to the constitutional claims heretofore dis-

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[3] Those shareholders who do reside in the United States, including plaintiff, have been paroled into the United States under 8 U.S.C. § 1182(d)(5). In other contexts, courts have held that since a parole alien has not been "admitted" into the United States, he stands in the same shoes as an alient resident outside the United States. Yuen Sang Low v. Attorney General of United States, 479 F.2d. 820 (9th Cir. 1973); Siu Fung Luk v. Rosenberg, 409 F.2d. 555 (9th Cir. 1969).

posed of. Moreover, under principals of international law, the treaty has terminated since one of the contracting parties no longer exists.[4]

Perry v. United States, 294 U.S. 330, 55 S.Ct.432, 79 L.Ed. 912 (1935), holding that the United States could not abrogate its obligation to repay its bonds in gold, is not on point. The United States has not repudiated its obligation to the Bank. It has simply blocked transactions involving that obligation to permit eventual resolution of the various potential claims.

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[4] ALI Restatement 2d, Foreign Relations Law of the United States § 159 (1965) states:

§ 159. Disappearance of State
If a state that is a party to an international agreement ceases to exist as a state, the agreement is terminated as to it, but the state into which it is incorporated or the states into which it is divided succeed to its rights and obligations under the agreement to the extent that
(a) the agreement defines the boundaries of the territory of the former state, or
(b) the agreement relates to the use of the territory or its natural resources.

CONCLUSION

For the reasons stated, the Court concludes that the actions of the Secretary in blocking the United States based assets in the Bank and declining to issue an unblocking license were within his authority. Accordingly, defendant is entitled to summary judgment.

IT IS SO ORDERED.

APPENDIX D

[Secretary of the Treasury's
Denial of application for
license to unblock funds]

FAC No. 82840

Mattaniah Eytan, Esquire
Kirkwood, Kaplan, Russin
& Vecchi
693 Sutter Street
San Francisco, California 94102

Dear Mr. Eytan:

Reference is made to Application B-90487 filed December 22, 1976, by your client, Tran Qui Than, a Vietnamese national residing at 745 Keeler Avenue, Berkeley, California, your letter of January 11, 1977, and your telephone conversations with Mrs. Moodie of this Office on January 11 and February 2, 1977. In the statements made by you to this Office on behalf of your client, you revealed that Mr. Than obtained payment of U.S. government contract funds from the U.S. Navy to the Dong

Phuong Bank, a Vietnamese national, in direct violation of the Foreign Assets Control Regulations.

You were informed by Mrs. Moodie on January 11, that the funds so obtained are blocked under Section 500.201(a) of the Foreign Assets Control Regulations (the "Regulations") and transfers thereof may be made without a Treasury license. You are hereby advised that Application B-90487 which seeks authorization to obtain a similar contract payment from the Army is hereby denied.

Your communications with this Office indicated that the Navy payments were made after April 30, 1975 (the "effective date" of the Regulations with respect to Viet-Nam) under contracts entered into prior to the effective date with Vietnamese enterprises. These contracts had been assigned to Dong Phuong Bank prior to April 30, 1975. (A copy of a letter from the Navy's

office in Thailand, identifying the contracts was enclosed with Application B-90487.)

The Dong Phuong Bank, a Vietnamese corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in the funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Office.

The actions of the shareholders and directors of the Bank described in the Applications were ineffective to dissolve it or transfer its assets. The Resolution did not even purport to transfer the bank's interest in the United States as-

sets to these shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Viet-Nam. Accordingly, there was neither a dissolution nor a transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Viet-Nam.

In your communications with this Office, you advised that the Navy Department had made payments directly to your client, Mr. Tran Qui Than, representing the Dong Phuong Bank rather than to the contractors which were ostensibly due the funds. You were advised that these funds were blocked because of the interest therein of the Bank, a Vietnamese national, and that the funds must be traced and placed in blocked accounts. You were requested to furnish details of the payments, including the amounts, dates of payments, method of pay-

ment, and persons to whom paid. You agreed to convey this request to your client and to furnish the information.

On February 2, 1977, you informed Mrs. Moodie that you relayed to your client the advice provided by this Office but you did not advise your client that you agreed that the funds were blocked. To the contrary, you stated that you were considering advising your client not to place the funds in a blocked account in the name of the Dong Phuong Bank and to institute legal action to prevent Mr. Than from being compelled to do so.

Since this Office has not received any response to our request for details concerning the payments made by the U.S. Navy, enclosed is a subpoena addressed to your client for delivery to Mr. Than. Also enclosed is a subpoena addressed to you regarding your knowledge of, and any actions by you regarding any payments by the

Navy to either you or your client.

Very truly yours,

Stanley L. Sommerfield
Acting Director
Office of Foreign Assets Control

Enclosures

ORDER TO APPEAR AND

FURNISH INFORMATION

THE SECRETARY OF THE TREASURY

To: Mattaniah Eytan, Esq.
693 Sutter Street
San Francisco, California 94102

GREETING:

Pursuant to Section 5(b) of the Trading with the Enemy Act, as amended, and Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, YOU ARE HEREBY REQUIRED to appear before Richard J. Hollas a representative of this Department, or before any person designated by him, at 1331 G Street, NW, Rm. 400, Washington, DC on the 9th day of March, 1977, at 10:30 AM of that day, to furnish complete information under oath relative to payments made by the U.S. Navy after April 30, 1975, under contracts on

which the Dong Phuong Bank was the assignee, including but not limited to:

1. The amounts paid under each such contract.

2. The date of payment.

3. The person or persons to whom the payments were made.

4. The method of payment.

5. The names of the officers of the U.S. Navy who authorized the payments and the Navy facility that effected the payments.

6. The present location of all of the funds that were paid to Mr. Than either individually or as an officer of the Dong Phuong Bank, or as representative of the shareholders of the Bank in the United States.

7. Representations made to the Navy regarding who was entitled to receive payment of the funds.

You are further required to make available for examination at such time all

records within your custody or control relative to the payments, including all books of accounts, records, contracts, letters, memoranda, or other papers.

PLEASE TAKE NOTICE that Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, provides that:

> "Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Secretary of the Treasury or any person acting under his direction or authorization complete information relative to any transaction subject to the provisions of this part. The Secretary of the Treasury or any person acting under his direction may require that such reports include the production of any books of account, contracts, letters, or other papers, connected with any such transaction in the custody or control of the persons required to make such reports. Reports with respect to transactions may be required either before or after such transactions are completed. The Secretary of the Treasury may, through any person or agency, investigate any such transaction or any violation of the provisions of this part regardless of whether any report has been required or filed in connection therewith."

PLEASE TAKE FURTHER NOTICE that Section 5(b) of the Trading with the Enemy Act, as amended, provides in part that whoever willfully violates any order or regulation issued thereunder:

> "shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

PLEASE TAKE FURTHER NOTICE that the records, documents or other material (including written reports or oral interviews under oath) furnished pursuant to this Order will be used primarily by the FAC in furtherance of its enforcement of 50 U.S.C., App.5(b) and 31 C.F.R., Part 500 (Foreign Assets Control Regulations). However, some information from such records, documents, et cetera, may be furnished to other interested Federal agencies relative to matters which are within

the jurisdiction of such agencies. Failure to furnish information as requested may result in a citation for contempt or criminal indictment for a willful violation of Section 500.602 of the Foreign Assets Control Regulations.

ISSUED this day of , 19 , by virtue of and pursuant to powers and authority delegated by the President of the United States to the Secretary of the Treasury by Executive Order 9193.

For and on behalf of the Secretary of the Treasury:

Stanley L. Sommerfield
Acting Director
Foreign Assets Control

ORDER TO APPEAR AND

FURNISH INFORMATION

THE SECRETARY OF THE TREASURY

To: Mr. Tran Qui Than
745 Keeler Avenue
Berkeley, California 94708

GREETING:

Pursuant to Section 5(b) of the Trading with the Enemy Act, as amended, and Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, YOU ARE HEREBY REQUIRED to appear before Richard J. Hollas a representative of this Department, or before any person designated by him, at 1331 G Street, NW, Rm. 400, Washington, DC on the 9th day of March, 1977, at 10:30 AM of that day, to furnish complete information under oath relative to payments made by the U.S. Navy after April 30, 1975, under contracts on

which the Dong Phuong Bank was the assignee, including but not limited to:

1. The amounts paid under each such contract.

2. The date of payment.

3. The person or persons to whom the payments were made.

4. The method of payment.

5. The names of the officers of the U.S. Navy who authorized the payments and the Navy facility that effected the payments.

6. The present location of all of the funds that were paid to Mr. Than either individually or as an officer of the Dong Phuong Bank, or as representative of the shareholders of the Bank in the United States.

7. Representations made to the Navy regarding who was entitled to receive payment of the funds.

You are further required to make available for examination at such time all

records within your custody or control relative to the payments, including all books of accounts, records, contracts, letters, memoranda, or other papers.

PLEASE TAKE NOTICE that Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, provides that:

> "Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Secretary of the Treasury or any person acting under his direction or authorization complete information relative to any transaction subject to the provisions of this part. The Secretary of the Treasury or any person acting under his direction may require that such reports include the production of any books of account, contracts, letters, or other papers, connected with any such transaction in the custody or control of the persons required to make such reports. Reports with respect to transactions may be required either before or after such transactions are completed. The Secretary of the Treasury may, through any person or agency, investigate any such transaction or any violation of the provisions of this part regardless of whether any report has been required or filed in connection therewith."

PLEASE TAKE FURTHER NOTICE that Section 5(b) of the Trading with the Enemy Act, as amended, provides in part that whoever willfully violates any order or regulation issued thereunder:

> "shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

PLEASE TAKE FURTHER NOTICE that the records, documents or other material (including written reports or oral interviews under oath) furnished pursuant to this Order will be used primarily by the FAC in furtherance of its enforcement of 50 U.S.C., App.5(b) and 31 C.F.R., Part 500 (Foreign Assets Control Regulations). However, some information from such records, documents, et cetera, may be furnished to other interested Federal agencies relative to matters which are within

the jurisdiction of such agencies. Failure to furnish information as requested may result in a citation for contempt or criminal indictment for a willful violation of Section 500.602 of the Foreign Assets Control Regulations.

ISSUED this day of , 19 , by virtue of and pursuant to powers and authority delegated by the President of the United States to the Secretary of the Treasury by Executive Order 9193.

For and on behalf of the Secretary of the Treasury:

Stanley L. Sommerfield
Acting Director
Foreign Assets Control

APPENDIX E

31 C.F.R. § 500.201

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him), by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country,or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect.

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States:

* * * * *

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States;

* * * * *

(d) The term "designated foreign country means a foreign country in the following schedule, and the terms "effective date" and "effective date of this section" mean with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area:

PART I

1. North Korea, i.e., Korea north of the 38th parallel of north latitude: December 17, 1950.

2. Cambodia: April 17, 1975.

3. North Viet-Nam, i.e., Viet-Nam north of the 17th parallel of north latitude: May 5, 1964.

4. South Viet-Nam, i.e., Viet-Nam south of the 17th parallel of north latitude: April 30, 1975 at 12:00 p.m. e.d.t.

31 C.F.R. §500.312

The term "interest" when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.

31 C.F.R. §500.505

The following are hereby licensed as unblocked nationals:

(a) Any individual in the United States except an individual who on or after the "effective date" was in, or who, on or since such date, has acted or purported to act directly or indirectly for the benefit of or on behalf of any designated foreign country.

(b) Any individual in the United States who has been paroled into the United States pursuant to section 212(d)(5) of the Immigration Act and Nationality Act of 1952 (66 Stat. 181; 8 U.S.C. 1181-1185) by the Attorney General provided that this subsection shall not apply:

* * * * *

22 U.S.C. §1645

(a) The Secretary of the Treasury may establish in the Treasury of the United States the Claims Fund for the payment of unsatisfied claims of nationals of the United States against Vietnam, as authorized by this subchapter.

(b) The Secretary of the Treasury shall deduct from any amounts covered into the Claims Fund an amount equal to 5 per centum thereof as reimbursement to the Government of the United States for expenses incurred by the Commission and by the Trea-

sury Department in the administration of this subchapter. The amounts so deducted shall be covered into the Treasury as miscellaneous receipts.

50 U.S.C. §1702

(a)(1) At the times and to the extent specified in section 1701 of this title [i.e., in times of national emergency], the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise --

* * * * *

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions

involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. App. §9

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and

held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of

such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall

determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated; Provided further, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale

of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so

sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency,and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net pro-

ceeds of the sale in an amount not to exceed the amount the claimant would have recieved had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.